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15-35, 15-105, 15-119 and 15-191

In the Supreme Court of the United States

DAVID A. ZUBIK, ET AL., PETITIONERS
v.
SYLVIA BURWELL, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD, FIFTH, TENTH, AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONERS

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(Additional captions listed on inside cover)

PRIESTS FOR LIFE, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL., RESPONDENTS

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL., PETITIONERS

v.

SYLVIA BURWELL, ET AL., RESPONDENTS

EAST TEXAS BAPTIST UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, ET AL., RESPONDENTS

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., PETITIONERS

v.

SYLVIA BURWELL, ET AL., RESPONDENTS

SOUTHERN NAZARENE UNIVERSITY, ET AL., PETITIONERS

v.

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GENEVA COLLEGE, PETITIONER

v.

SYLVIA BURWELL, ET AL., RESPONDENTS

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Petitioners. He filed a brief[2] in support of non-governmental parties *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ("*Hobby Lobby*"), and is following up on that set of ideas, in the present cases which resemble *Hobby Lobby*, but also have notable differences from that case.

...We live in a time of religious war and discord, when ISIS is busy beheading people abroad, and encouraging attacks here at home. In the U.S. presidential race, one candidate threatens to prevent Muslims from entering the country; another pontificates that only someone who prays on his knees at every morning's beginning is worthy to be President. But terrorists and politicians are not the only sources of religious strife: some Americans, like Petitioners, feel their religious rights are under serious attack by the State. Conversely, other Americans, like some allies of Respondents, feel that religious fanaticism, by Petitioners or others, is infringing on their secular rights and entitlements. The Court, while protecting Petitioners' rights, can also show sensitivity to others' rights and needs, and thus help prevent excessive, needless religious or anti-religious strife in our land.

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[1] No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court.

[2] *Available at* http://sblog.s3.amazonaws.com/wp-content /uploads/2014/02/13-354_bsac__13-356_tsac_ DavidBoyle1.pdf.

Everyone's rights and dignities are important. One powerful piece of American culture, the late Lesley Gore's ballad *You Don't Own Me*,[3] expresses this nicely ("And don't tell me what to do/Don't tell me what to say", etc., *id.*); that paean to freedom nicely encapsulates the various Petitioners' unwillingness to cooperate in any way with unwanted, perceivedly coercive, governmental contraception or abortion efforts. (The Little Sisters of the Poor, from their name, even sound like a 1960's "girl group", e.g., the Supremes—not to be confused with the Supreme Court—,Paris Sisters, Shirelles, Daughters of Eve, Martha and the Vandellas, etc.)

Of course, from the other end, that famous song, *supra*, could also express the point of view of women employees who want to have as many contraception/abortion choices as anyone else, freely, with as many resources as other American women have.

(This sort of tension can also be found, interestingly enough, in the relation between, on the one hand, women's freedom over their own bodies, and not to be dictated to; and on the other hand, unborn children's possible moral right *not* to be regarded as disposable property, and, consequently, to *be* regarded as having a right to life. But Amicus will cover that issue more in his brief for another case in a few weeks.)

For now, we focus on contraceptive issues, including the rather distressing "war of women" against each other here: religious Sisters on one end, secular-feminist contraception advocates on the

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[3] (Mercury 1963).

other. Amicus is seeking ways for all women (and men) in these seven instant cases to be treated fairly.

On that note, the Court should ideally try to do all the below:

a) relieve Petitioners from any cooperation with, or contractual relation with, entities providing undesired contraception/abortion resources to Petitioners' female employees;

b) ensure that female employees (or students) of Petitioners have access to the contraception resources that the Act mandates they should have, or access to a rough equivalent (e.g., the cash value of such resources);

c) prevent the public from having to pay for step "b", above, insofar as reasonably possible: e.g., by the adoption of cost-neutral measures, and/or the transference of appropriate money value from Petitioners to their female employees, or indirectly, by fine, to other parties who will facilitate contraceptive-resource access to those employees.

If anyone has a better solution, that respects Petitioners, and their female employees/students, and also taxpayers (or insurers) who should not have to pay extra money because of Petitioners' decisions, Amicus would be glad to hear it.

SUMMARY OF ARGUMENT

As a procedural matter of sorts: the Court's definitions of "strict scrutiny" over the decades have been unclear or even mutually contradictory, so any

mention of strict scrutiny in these cases, or others, could use serious clarification.

Petitioners should receive the exemptions they ask, for there are many people whose religious foibles, scruples, or outrages are far worse than Petitioners' understandable distaste for signing certain forms.

Faith-based organizations should not get an automatic free pass to impose burdens/externalities on people, any more than any other corporations should. Being a religious group does not put you above scrutiny.

If Petitioners were to unjustly deny their female employees the wage quantum which the value of the mandated contraceptive package represents, or unjustly shift costs onto employees or taxpayers (or insurers), that would be best avoided.

Petitioners could be given various options to provide to female employees at least the value of contraceptive coverage: e.g., a voucher, or a check, or HSAs or HRAs; or, alternately, they could pay the Government fines equivalent to the Government's work in arranging appropriate contraceptive provision.

The *United States v. Carroll Towing Co.* (159 F.2d 169 (2d Cir. 1947)) tort negligence formula, or other rubrics, may be of use in forming models to apportion the various burdens in the case (e.g., burden on Petitioners, on women, on taxpayers).

For example, paying a female employee enough for an IUD in her first year on the job, and some

more later on, could be fair; fair enough to save Petitioners from losing these cases, even.

Some of the Government's accommodations may have been too lenient, and could be rectified, or reacted to by the Court, to prevent unjust infliction of externalities onto women or taxpayers.

"Discovery" issues are important here, in that Petitioners may not give the information needed to target contraceptive care to Petitioners' employees. The Court could allow the Government to fine Petitioners for the amount that the Government needs to set up "discovery" procedures to target the care appropriately.

The case of Kim Davis and same-sex-marriage licenses is worth discussing, since it presents similar questions of religious exemption, individual conscience, and externalities suffered by people who are deprived of a publicly-mandated service.

In line with Pope Francis' recent declaration that the Church should be poor, it is best that religious institutions, not taxpayers, pay for their own externalities.

In all, the Court should find ways to let Petitioners have their exemptions, while letting women employees have contraceptives or items of equivalent value, and not letting Petitioners shift excessive costs to others. Were this sort of fairness not to happen, the Nation, and the People, could suffer greatly.

ARGUMENT

I. GIVING STRICT SCRUTINY TO "STRICT SCRUTINY": WHAT EXACTLY DOES THAT TERM MEAN ANYWAY?

Before reaching the main issues covered in this brief, Amicus wanted to focus on the uncertainty in this Court's definition of what the term "strict scrutiny" actually means. The Court did not use that term in the *Hobby Lobby* case, *see id.*, even while the Court was discussing the Religious Freedom Restoration Act of 1993 ("RFRA")[4] and its requirements of "compelling state interest" and "least restrictive means" By contrast, in *Gonzales v. O Centro Espirita Beneficente União Do Vegetal*, 546 U.S. 418 (2006), the Court used the term "strict scrutiny" four times, e.g., "RFRA, and the strict scrutiny test it adopted", *id.* at 430 (Roberts, C.J.).

By further contrast, *Employment Division v. Smith*, 494 U.S. 872 (1990), a noted religious-freedom case, uses "strict scrutiny" three times (according to the word-search computer function Amicus is using), without strictly defining that term, but defining it by implication, mentioning "requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest", *id.* at 894 (citations omitted) (Scalia, J.). Similarly, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), says, "A law burdening religious practice that is not neutral or not of general application must undergo the most

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[4] Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq.*

rigorous of scrutiny[; it] must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests." *Id.* at 546 (citations omitted) (Kennedy, J.).

So at the present time, strict scrutiny means something different from what it used to: *Vegetal*, *supra*, says it's compelling state interest plus least restrictive means, whereas *Smith* and *Babalu*, *supra*, say it's compelling state interest plus narrow tailoring. In any case, the RFRA standard of compelling state interest plus least restrictive means has to be used these days for religion cases: but should the Court ever be calling that standard "strict scrutiny" if that's not what it really is?

Amicus' background on this is that he had long thought, since his classes in law school, that strict scrutiny always had to have three prongs: compelling state interest *and* narrow tailoring *and* least-restrictive means. (This is also the definition of strict scrutiny on the redoubtable Wikipedia,[5] *see id.*. a three-pronged test.) Thus, if it is missing one prong, it should really be called "Sorta-Strict Scrutiny", or not be given a particular level of scrutiny at all. (It could be noted, accurately, as being somewhere between intermediate scrutiny and strict scrutiny.)

Indeed, in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Court mentions that a standard for holding speech-impacting legislation to be unconstitutional is when that legislation is "not narrowly tailored to

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[5] *Strict scrutiny*, https://en.wikipedia.org/wiki/Strict_scrutiny (as of 21:03 GMT, Dec. 22, 2015).

serve a compelling governmental interest and because less restrictive alternatives [a]re available", *id.* at 661 (citing *Reno v. ACLU*, 521 U.S. 844 (1997)) (Kennedy, J.). So, all three prongs are there. (*Ashcroft*, *supra*, mentions the word "strict scrutiny" only twice, *id.* at 670, 676, but the idea is there.)

And narrow tailoring and least restrictive means are not identical, to put it mildly. One can imagine a law that uses least-restrictive means, in terms of burdens and punishments; but is not narrowly tailored, in that it assigns benefits, rewards, or entitlements in a loose, not narrowly-tailored, way. Conversely, even a narrowly-tailored law may not use the narrow-*est*, least restrictive means possible. So one cannot easily argue that the *Vegetal* definition of strict scrutiny is identical to the *Smith* or *Babalu* definition, but is just using a differently-named term, "least restrictive means", instead of "narrow tailoring" The terms really are different.

Then again, Court practice has sometimes used one term to subsume another; *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986):

> Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning[;] the term may be used to require consideration of whether lawful

> alternative and *less restrictive* means could have been used.

Id. at 280 & n.6 (citation omitted) (emphasis added) (Powell, J.). Thus, *see id.*, "narrowly tailored" more-or-less subsumes "least restrictive means" in *Wygant*, *supra*. The *Wygant* standard of strict scrutiny is thus stricter than the *Vegetal* standard, which lacks "narrow tailoring" (unless one assumes that "least restrictive means", in RFRA or elsewhere, automatically includes "narrowly tailored", which is quite questionable). Thus, the *Vegetal* standard should not really have been called "strict scrutiny", perhaps. *Hobby Lobby* may have been wise to avoid the term "strict scrutiny"

So when Petitioner's merits brief in 15-35 et al. says, "Through RFRA, Congress guaranteed application of strict scrutiny", *id.* at 6, that may not actually be true: it may not be genuine strict scrutiny, as per the discussion above and the missing prong of narrow tailoring. One reason this is important is in terms of psychological impact. Just hearing the words "strict scrutiny" may subconsciously make people judge a law more harshly than the actual standard, which may not be true strict scrutiny. (Amicus writes this brief in support of Petitioners, but a fair playing field for all parties is also important.)

Another problem is that in the future, a less scrupulously scrupulous Court than this one might misuse the present ambiguity in "strict scrutiny" For example, if there were a law they personally liked, they might use the version of "strict scrutiny"

with only two prongs, and drop the third prong, in order to give the law an easier time in passing. Conversely, for a law they found personally odious, they might add on a third prong, to make passage of the law more difficult, where only a two-prong analysis might have been appropriate.

And the irony in the Court calling a certain standard "strict scrutiny", but not bothering to be strict about what that term actually means, and letting that meaning vacillate from case to case, year to year, etc., is profound irony indeed.

So what should the Court do? Some alternatives:

a) Do nothing and let the confusion and problems fester (a bad idea);

b) Say that strict scrutiny means any standard which has at least "compelling state interest" plus *either* "narrow tailoring" or "least restrictive means" (or both); that would let both the *Vegetal* definition and the *Smith/Babalu* definition describe strict scrutiny, without contradiction.

A problem, though, is that the "least restrictive means" version would likely be seen as the stricter, truly strict scrutiny, whereas the "narrow tailoring" version might be seen as merely "sorta-strict scrutiny" or "Strict Scrutiny Lite" Indeed, one professor has noted that "least restrictive means" may be more strict than "narrow tailoring", *see* Marci Hamilton, *How a RFRA Differs from the First Amendment*, RFRA perils (undated), http://rfraperils.com/how-a-rfra-differs-from-the-first-amendment/: "'Narrow tailoring' means that the law is well-tailored to the government interests it is

supposed to serve[;] the government does not have to prove that it has considered and rejected all less restrictive alternatives. Proving a 'least restrictive means' is significantly more difficult[.]" *Id.*

c) Have different forms of "strict scrutiny" for different fields of law; one for religion (such as RFRA issues, and comprising the "compelling state interest" and "least restrictive means" prongs), one for speech (comprising all three prongs), one for race relations, etc. However, this might not only make things more confusing, it might make "fundamental rights" and "suspect class" doctrines more unstable.

If each different fundamental right and suspect class has its own different flavor of strict scrutiny—which may approach 31 flavors, for all we know—, it could even arguably be better to drop the term "strict scrutiny", period, since it may pretend to a stability and clarity it does not possess;

d) Riffing off c), *supra*: abandon the term "strict scrutiny" entirely. However, this would disappoint fans of the term, and also leave "intermediate scrutiny" as the highest form of scrutiny, which nomenclature would be self-contradictory, since "intermediate" is not "highest";

e) Adopt the three-prong version of "strict scrutiny" as the standard. This would not only fit Amicus' nostalgic memories of law-school-era constitutional-law definitions, and Wikipedia's fine article *supra*, it would be an inarguably *strict* standard. Not a mere two-prong standard, but the full three prongs.

Lesser, two-prong versions would simply not be called strict scrutiny any longer—which makes sense, since they are not as strict as they could be.

Again, in the instant cases, the Court has to use the RFRA two-prong standard; but it should likely avoid calling it "strict scrutiny", and may in these cases, or any or all others, want to define more strictly, what "strict scrutiny" actually means.

After all, "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (Kennedy, O'Connor, and Souter, JJ.).

Amicus thanks the Court for giving strict scrutiny to this important issue. —Now to other matters:

II. PETITIONERS' RELIGIOUS RIGHTS SHOULD NOT BE VIOLATED

Petitioners' briefs say largely what needs to be said in defense of their claims, so Amicus shall not repeat much of it here. Their arguments are strong, and chime with common sense, too, any legalities aside. Is it not rather perverse for the State to tell a group called "Priests for Life" to go provide artificial contraceptives to people, including contraceptives which may have an abortifacient effect?

Cf. Pope Francis' address to Congress, Sept. 24, 2015:

> A delicate balance is required to combat violence perpetrated in the name of a religion, an ideology or an economic system, while also safeguarding

> religious freedom, intellectual freedom and individual freedoms.
>
> The Golden Rule also reminds us of our responsibility to protect and defend human life at every stage of its development.
>
> I cannot hide my concern for the family, which is threatened, perhaps as never before, from within and without. Fundamental relationships are being called into question, as is the very basis of marriage and the family.

Address of the Holy Father, available at https://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html.

Respondents and their allies may present their own version of "common sense", trying to argue that the Government has already given Petitioners many opportunities to opt out of direct provision of contraceptives, so that, Respondents might say, Petitioners are just being difficult and making a mountain out of a molehill.

But Amicus disagrees. If, for example, there are certain pieces of paper which say that Petitioners' health care plans and infrastructure are still being used to provide the contraceptives, even with any so-called "opt-out", then Petitioners have a very reasonable claim that any forms they must fill out are still enabling the contraceptive delivery, in a way

that causes sin, shame, and public scandal which all grossly impede Petitioners' faith lives.

So, even if some observers find Petitioners' moral judgments to be overscrupulous, petty, illogical, or absurd, that should not invalidate the value of Petitioners' moral reasoning in the eyes of courts. (It seems that various appeals courts below took it on themselves to invalidate Petitioners' moral judgments; this seems unwise.)

Religions have traditionally had beliefs or demands that many people find unprovable or laughable. One religion claims God appeared in some burning shrubbery. Another one claims that God came down to Earth, got killed, started to live again, and now reappears every Sunday in some dry wafers and red wine. Another religion suggests that eating pigs or drinking pilsners is a sin. But in our free Nation, the First Amendment protects people's beliefs—no matter how "wild" those credos may seem—, and maybe even belief-based actions.

Some ignorant folk may think it petty, for example, for religious Jews to root through their houses for every speck of *chometz*[6] around Passover time: how could the God of all Creation care about whether there is a tiny seed somewhere in your house? But it is Americans' right to believe that even a tiny little seed can be a cause of sin.

American law and bureaucracy have respected some of the most conventionally irritating and repulsive iterations of "religion" imaginable. *See,*

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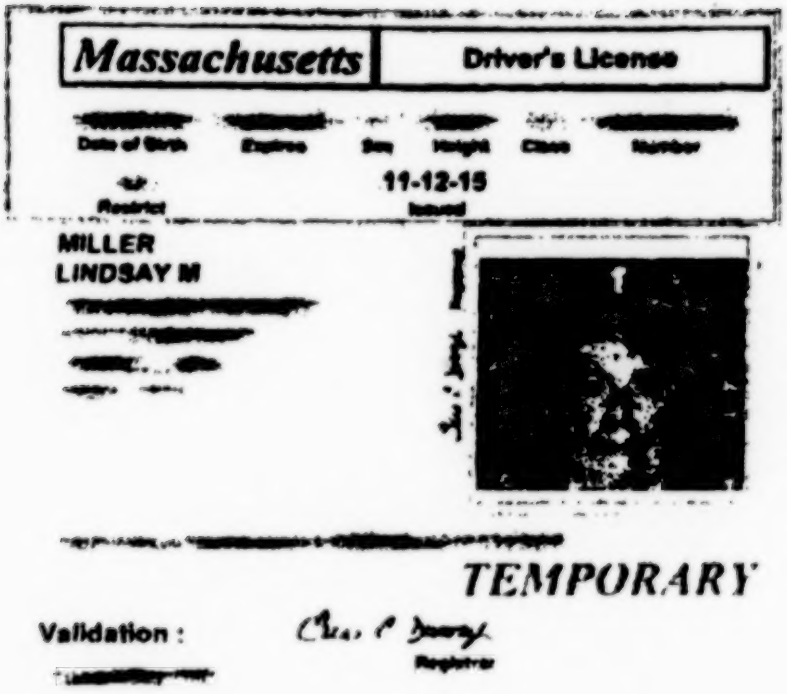
[6] *See* Wikipedia, *Chametz*, https://en.wikipedia.org/wiki/Chametz (as of Nov. 15, 2015, 4:03 GMT).

e.g., CBS Boston, *'Pastafarian' Woman Allowed To Wear Spaghetti Strainer In Driver's License Photo*, Nov. 13, 2015, 3:35 p.m., http://boston.cbslocal.com/2015/11/13/pastafarian-spaghetti-monster-drivers-license-lindsay-miller/.

> The Registry of Motor Vehicles allowed a Massachusetts woman to wear a spaghetti strainer on her head in her driver's license picture as an expression of her "Pastafarian" religion.
>
> Lindsay Miller fought the RMV to wear the metal headgear[, saying,] "As a member of the Church of the Flying Spaghetti Monster, I feel delighted[.]"



Id. (original captions absent from both illustrative photos))

Ms. Miller may look like a maniac, or someone who is mocking religion by wearing a colander on her conk. Nevertheless, she gets to do what she wants, even if her good taste or genuine sanctity should be taken with a grain of salt. (And, seeing her "Pastafarianism", maybe also taken with a clove of garlic, and some oregano...)

Seeing what Linsday Miller is allowed to get away with, *supra*, how is what Petitioners assert unreasonable at all, re their own religious freedom? It seems far more sensible to Amicus, that the present "contraceptive opt-out" process for Petitioners is morally offensive to their interpretation of Christianity; than that someone

may sport a spaghetti strainer like a hole-filled halo, and call that "religion" Petitioners have made their point, especially since their version of religious practice is far less "strained" than some other people's.

III. PETITIONERS MAY HAVE ADDITIONAL RESPONSIBILITIES TO EMPLOYEES OR TAXPAYERS, EVEN IF VICTORIOUS HERE: RELIGIOUS INSTITUTIONS ARE NOT ABOVE CRITICISM OR RESPONSIBILITY

However, that is not the whole story It is a false dichotomy to say that either Petitioners should win and get to walk away without further consequence, or that Respondents should get to do that either. There may be some "gray area" in between.

Amicus supports religion, and may even be religious himself. However, religious institutions are not entitled to automatic deference, or willful blindness, concerning any damage that they do to other people. And women's legal reproductive rights, in particular, have been under literal physical attack lately under "religious" auspices, with Robert Dear's killing three people, committing three "adult abortions", as it were, at a Planned Parenthood clinic last November, *see* Richard Fausset, *For Robert Dear, Religion and Rage Before Planned Parenthood Attack*, N.Y. Times, Dec. 1, 2015, http://www.nytimes.com/2015/12/02/us/robert-dear-planned-parenthood-shooting.html?_r=0 (describing Dear's probable "religious" rationale for killings).

A superstitious awe of religious institutions can be destructive, and discourage legitimate criticism.

Even the Nazarene was critical of the Pharisees of his time; he saw behind their whitewashed facades. (There may be no Pharisees in the instant cases; Amicus is just trying to make a general point.) *See, e.g.*, the current film *Spotlight* (Open Road Films 2015), the story of some badly-needed investigative reporting which disclosed massive church child-molestation scandals and cover-up in Massachusetts.

Another pop-cultural reference of use here is the two famous *Peanuts* television specials, *A Charlie Brown Christmas* (CBS television broadcast Dec. 9, 1965) and *It's the Great Pumpkin, Charlie Brown* (CBS television broadcast Oct. 27, 1966). In the first, which recently had its 50th anniversary celebration, Linus is the "spiritual hero" of sorts, reading, *see id.*, the annunciation-to-the-shepherds scene from the Gospel of Luke on national television. However, *Great Pumpkin*, as not everyone may have noticed, also features a religious Linus, but this time, *see id.*, as a religious fanatic, almost like a pint-sized (and nonviolent) Charles Manson, with Sally (Charlie Brown's little sister) as his disillusioned groupie who learns there's no Great Pumpkin as she loses her chance to go trick-or-treating. Linus' deranged faith in the eponymous orange mega-squash is logically baseless, of course; and this tracking of Linus from his best, in the Christmas special, down to his worst, in the Halloween special, shows how the best of us all, including religious impulses, can turn to the worst, and how blind faith should be tempered by reason—in real life, not just cartoons.

But one can criticize rationally without descending into anti-religious invective. For

example, Mother Teresa (soon to be Saint) deserved her Nobel Peace Prize, Amicus believes, but some criticism has surfaced about her allegedly providing substandard analgesic care and sanitary standards at some of her facilities. *See, e.g.*, the inflammatorily-named *The West's big lie about Mother Teresa: Her "glorification of suffering instead of relieving it" has had little impact on her glowing reputation*, by George Gillett on Salon.[7] However, one does not have to believe that Mother Teresa was some sanctimonious fraud (as some have alleged) just because her performance as healthcare provider was imperfect. Instead, one can believe she was truly saintly, but also truly imperfect, and could hypothetically have provided better medical care at some of her religious order's facilities.

On a similar note, though Petitioners are likely some of the finest and most altruistic people in the Nation, that does not put them above criticism. Petitioners, to be blunt, are seeking the right to provide a lower standard of healthcare to their employees, lower than the Government mandates. Amicus supports this right, given the circumstances. But someone else has to provide the care—and may be able to fine Petitioners accordingly—, or Petitioners could provide it in an alternative form (e.g., money or voucher).

IV. THE COURT SHOULD PREVENT PETITIONERS FROM UNDULY SHIFTING

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[7] Jan. 3, 2016, 6:00 a.m., http://www.salon.com/2016/01/03/the_wests_big_lie_about_mother_teresa_her_glorification_of_suffering_instead_of_relieving_it_has_had_little_impact_on_her_glowing_reputation/.

COSTS ONTO OTHERS, OR FROM DEPRIVING FEMALE EMPLOYEES OF WAGES

For Petitioners to risk shifting costs onto others could be damaging. —Let us imagine an employer, Fred Fanatic, whose religious beliefs (he says) prevent him from paying his employee Poorman Pete the federal minimum wage. Fred actually pays close to the minimum wage, but still not quite up to par. When the Feds roll around to ask him what's happening, he says, "If you litigate this, your litigation costs and mine will probably be higher than the difference between the wage I pay, and the minimum wage! So it'd be cheaper if you just paid Poorman Pete that difference yourselves!"

But would that be tolerated? Fred's willingness, under "religious" auspices, to shift costs either onto Poorman (sub-minimum wage) or the Government and taxpayers (making them pay Poorman the difference between his current wage and the statutory minimum)? Maybe it should not be tolerated.

Back during the *Hobby Lobby* litigation, one pundit, Amanda Marcotte, wrote that "having regular access to contraception makes it easier to have fun, fulfilling sex, for both men and women. This is what aggravates opponents of the contraception mandate, but the aggravation of a bunch of uptight puritans should not be anything to base our government policy on." *Your Health Care, Your Choices (Amen, to That!)*, "Under Coverage", The Daily Beast, Mar. 24, 2014, 5:45 a.m., http://www.thedailybeast.com/articles/2014/03/24/your-

health-care-your-choices-amen-to-that.html. Marcotte may have been in error: her article, *supra*, does not even mention the abortifacient properties of some of the contraceptives in question, which is what really riled up the *Hobby Lobby* plaintiffs. (And if she thinks people who morally question artificial contraceptives hate sexual activity: has she seen the enormous size of some of the families opposing contraception? All those children didn't just grow on trees.)

Yet, there are some large grains of truth in her article, too:

> After all, your health care plan belongs to you, as your paycheck does. You worked for it and your boss transfers it to you, along with your other benefits and paycheck, as compensation for your work.
>
> It's your health care plan. You paid for it with the sweat of your brow. If you want to use it for a happier, healthier sex life, it's not anyone else's business.

Id. While Amicus opposes forcing Petitioners to sign forms they don't want to (and also disagrees with some of Marcotte's tone...), still, Marcotte has a valuable point about the value of women's wages. Indeed, employees may have a right to do things with their wages, which employers find immoral and disgusting. Such is freedom.

See also Jeremiah 22:13, "Woe to him who uses his neighbor's services without pay and does not give him his wages"; *Malachi* 3:5, "'Then I will draw near to you for judgment; and I will be a swift witness against those who oppress the wage earner in his wages ' says the LORD of hosts"; *James* 5:4, "Behold, the pay of the laborers who mowed your fields, and which has been withheld by you, cries out against you; and the outcry of those who did the harvesting has reached the ears of the Lord of Sabaoth"; *Mark* 7:11, "But you say it is all right for people to say to their parents, 'Sorry, I can't help you. For I have vowed to give to God [*corban*] what I would have given to you.'"; 1 *Timothy* 5:18, "The worker is worthy of his hire" *Id.*

See, too,

> Yet neither may that same exercise [of religion] unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.

Hobby Lobby, 134 S. Ct. at 2786-87 (citation omitted) (Kennedy, J., concurring).

And for someone else who thinks that women in these cases may have rights to their wages, *see* the creative idea of Edward A. Zelinsky, *The Little Sisters, the Supreme Court and the HSA/HRA alternative*, OUPblog, Dec. 7, 2015, http://blog.oup.com/2015/12/little-sisters-supreme-court/,

> [A]ny religious employer objecting to any otherwise ACA-mandated item of medical coverage should have the right to instead fund an independently-administered health savings account (HSA) or health reimbursement arrangement (HRA) for each of its employees. Any employer maintaining HSAs or HRAs for its employees could then decline to offer its employees any particular form of medical coverage to which the employer objects on religious grounds.
>
> Employees can use their employer-provided HSA or HRA funds to purchase any medical service or device they want—in the same way such employees can use their cash wages as they please[;] an employer has no control over an employee's decisions to spend his wages as he chooses[.]

Id. In this brief, while not supporting artificial contraception or abortion in any way, of course, Amicus is not supporting anything that could resemble wage theft, either. People tend to use their money as they want.

And finally, *see* Nolan Feeney, *Pope Francis Calls for Equal Pay for Women and Men*, Time, Apr. 29, 2015, http://time.com/3840049/pope-francis-equal-pay/,

> Pope Francis expressed support for equal pay for men and women on Wednesday, calling income disparities "pure scandal."
>
> Speaking during his weekly general audience, Francis asked that Christians "become more demanding" about achieving gender equality
>
> "Why is it expected that women must earn less than men?" he asked the crowd at St. Peter's Square. "No! They have the same rights. The disparity is a pure scandal."
>
> The Pope emphasized that concern for women's equality isn't at odds with concern for declining marriage rates around the world, a shift he said Christians needed to reflect on "with great seriousness."
>
> "Many consider that the change occurring in these last decades may have been set in motion by women's emancipation," he said. But Francis called that idea "an insult" and "a form of chauvinism that always wants to control the woman."

Id. Of course, one could make snide remarks to the effect that women employees are actually being paid "more than men" due to the Government mandate. But men, due to their unique biology, usually do not

need IUD's or other anti-pregnancy implements. The kinds of people who might argue that the mandate "pays women too much", are the kinds who might argue, and argue badly. that women should never get pregnancy benefits because men don't get them, so that it would be ""unequal"" to give them to women. So, equitably, "equal pay" in the instant cases may mean giving them the cash value of their mandated contraception package.

How might that value be determined, though?

V *CARROLL TOWING* AND FINDING FORMULAE TO DEAL WITH THE PRESENT ISSUES

In determining just how much wages Petitioners should compensate female employees for, since those employees would not receive the mandated contraception package, the Court could, say, remand the instant cases to lower courts to do some fact-finding. And similarly so with what amount Petitioners might be fined, if they decline to pay female workers extra wages, and instead opt to pay a fine no larger than what the Government expends in routing contraceptives to the woman. (Amicus is aware that Petitioners cannot be fined, under RFRA, in an amount that would be a "substantial burden", *id.* However, that does not mean they should be fined nothing.)

Or the Court could devise its own algorithm or equation. If one posited "X" number dollars as the level equaling "substantial burden" under RFRA, and "Y" as the dollar amount of externalities that Petitioners' refusal to provide contraceptives, or sign

certain forms or otherwise cooperate with the Government, imposes on people: there could be, for example, a simple "If Y < X, considering Y as externalities and X as 'substantial burden' threshold, then Petitioners must pay Y to somebody who should have it, whether to female employees as wages, or some portion of Y to the Government as fines." But if that is too simplistic, then the Court can do otherwise.

Carroll Towing, *supra* at 4, after all, has the well-known "B < PL" (liability if burden of precaution is less than probability times gravity of injury) formula, 158 F.2d 173. Amicus is not formally asking the Court to create a new formula for the instant cases, but there should at least be a thought process which goes over the various factors in the cases, just as the *Carroll Towing* formula *supra* accounted for various relevant factors.

Clearly, what Petitioners are asking for, burdens women less than a complete cutoff of all health benefits (as some Christian Scientist employers might want) would do. But the burden Petitioners pose to women employees is greater than some imaginable burdens (say, if Petitioners refused to pay for only the last dollar of contraceptives, which refusal would burden female employees exactly a dollar), and greater than the burden in *Hobby Lobby*, where there was no problem of Hobby Lobby refusing to fill out certain forms. So, proportionality is important here.

Since we are dealing with churches, a quick visit to the "cathedral" of Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and*

Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972), may be in order. That article often mentions the difficulty of assessing costs, *see id. passim*. "Rule 2" in *Cathedral*, *supra*, at 1116, might give us a "liability rule" by which Petitioners may avoid funding contraceptives, but must pay serious damages (or, hypothetically, cancel *all* their healthcare programs for employees and still pay some damages). But, again, Amicus recommends reducing any "damages" to no greater than the Government's administration cost of routing contraceptives to employees, or the cost of paying extra wages to employees, either of which would likely avoid the "substantial burden" RFRA is designed to prevent.

VI. ONE PROPOSAL FOR HOW MUCH IN WAGES PETITIONERS COULD PAY WOMEN EMPLOYEES

Rather than just throwing out formulas (or ideas for formulas) and theories, Amicus will offer one concrete proposal, out of the many that might suffice for justice.

For example, Petitioners could provide their female employees an additional $1200-$1500 of wages during the first year of their employment, which should be enough to pay for an intrauterine device, *see Hobby Lobby*, 134 S. Ct. at 2800 n.22, "IUDs, which are among the most reliable forms of contraception, generally cost women more than $1,000 when the expenses of the office visit and insertion procedure are taken into account." *Id.* (citation omitted) (Ginsburg, J., dissenting) In following years, female employees could receive an

extra $300 instead of an extra $1500 a year, say, since they probably do not need a new IUD every year.

If Petitioners would be penalized $100 a day for noncompliance with mandates, that amount times 365 days is $36,500 a year. $300 a year is less than a hundredth of that, so may not be a substantial burden on Petitioners at all. Even if it were the $2000 penalty for not even having a health plan, $300 is less than a sixth of that. So no substantial burden may result if Amicus' figures *supra* are used.

Obviously, these figures could be "tweaked" considerably, whether by this Court, lower courts, or others. But the proposal above would at least offer some degree of justice: funding women's health, but not financially crippling Petitioners.

Offering cash to female employees would likely cost more than paying a fine to the Government in the size of what the Government spends to give Petitioners' employees contraceptives. But Petitioners would have more control over the delivery of the cash in the first option: e.g., they could include with the money a friendly, non-threatening reminder that the employer is not encouraging that the money be used to buy contraceptives. Also, if Petitioners feel "stigmatized" by paying any fine at all, they can avoid that by paying their female employees cash instead. So, Amicus is trying to make sure that Petitioners have at least two options: paying higher wages, or paying a (likely smaller) fine. Whatever they prefer.

But instead of just worrying about how Petitioners may feel "stigmatized" by having to pay a small fine, let's think about how their *female employees* may feel stigmatized or hurt by having part of their wage package denied by Petitioners. *See* Reuters Found. in New York, *Depression and anxiety in women linked to male-female pay gap*, The Guardian, Jan. 7, 2016, 1:17 a.m., http://www.theguardian.com/us-news/2016/jan/07/depression-and-anxiety-in-women-linked-to-male-female-pay-gap,

> Women who make less money than men were four times more likely to develop an anxiety disorder[,] researchers at New York's Columbia University found after comparing women and men with matching education and work experience.
>
> "Our results show that some of the gender disparities in depression and anxiety may be due to the effects of structural gender inequality in the workforce and beyond," said Jonathan Platt, a doctoral student who is the study's lead author.

Id. Women may actually notice when they are being deprived of their due.

One reason Amicus is bringing up the possibility that Petitioners may have to pay some extra money, is to forestall a worse possibility. That is, what if, for all we know, 5 or more Members of the Court decide

that in these cases, the difficulties caused by accommodating Petitioners (including Petitioners' refusal to sign forms; contraceptive providers' difficulty in identifying who Petitioners' female employees even are, since Petitioners presumably may not let those providers know who they are, lest they get contraceptives; etc.) mandate that Petitioners lose the case?

Would Petitioners prefer to lose these cases entirely, or to suffer a smaller loss such as having to pay their female employees a little more, or paying an even smaller fine? Amicus thinks the second option, paying a little more rather than losing the whole case(s), might be the wise choice for Petitioners.

VII. HAS THE GOVERNMENT BEEN TOO GENEROUS AND LENIENT TOWARDS SOME EXEMPTED ORGANIZATIONS?

Considering the broader framework of things: Amicus is wondering if the Government has actually been too easy on some religious groups, corporations, or individuals, in giving them exemptions from contraceptive mandates. He supports the exemptions, but wonders if those exemptions, even for churches themselves (as opposed to church-related groups like Petitioners), should have originally mandated some equivalent option, such as higher wages for female employees, etc., if the groups, companies, or individuals did not want to provide contraceptives themselves. (Amicus even wonders if the accommodations might violate equal protection, as implied in the Due Process Clause of the Fifth Amendment, in that the accommodations

may disproportionately affect women in a negative manner.)

While churches may have moral objections to contraceptives, they probably do not have moral objections to wages, or they would not pay anybody any wages. So they might not have a leg to stand on if they complained that paying higher wages was against their religion.

During this present litigation, it might look retaliatory if the Government were right now to issue new regulations which mandated that even churches, and corporations like Hobby Lobby, must pay higher wages, or an appropriate fine to the Government equal to what the Government spends in facilitating contraceptive provision, if their health care plans don't offer contraceptives, and if what the Government spends in facilitating contraceptive provision is not just a *de minimis* amount. Perhaps in the future the Government could do this, though.

It seems that the Government's attempts to accommodate Petitioners, and others, may not be very adept, but they may be sincere nonetheless. Amicus does not think of the Government as a bunch of devils who are seeking new ways to torment religious people and inveigle them into evil contraceptive or abortion activities.

The Government has made various efforts to listen to Petitioners and others; and for Petitioners to argue that if the Government has given some people exemptions, then Petitioners must automatically receive exemptions too, is not necessarily true. (The phrase "give an inch, take a mile" comes to mind.) Again, it might work the other

way that even if Petitioners do receive exemptions (as Amicus wants them to), they, and maybe even churches or corporations, may be subject to some due monetary outlay to compensate for any externalities beyond *de minimis* ones.

Amicus is certainly not suggesting that the Court go back and overturn *Hobby Lobby* (!); but if there are present complaints about excessive externalities (difficulties for women; expense above *de minimis* for the Government; etc.) caused by exemptions from the contraceptive mandate, perhaps the Court could consider that and try to make things more just in the present and future.

VIII. "DISCOVERY" ISSUES AND EXPENSES: TARGETING PETITIONERS' FEMALE EMPLOYEES FOR CONTRACEPTIVE SERVICES AND KEEPING THEM INFORMED MAY COST SOMETHING

And if there are expenses above *de minimis* involved in getting contraceptives to Petitioners' female employees, much of that may come about from the "discovery" expenses, so to speak, of even finding who the employees are, and linking them up with services and information (e.g., e-mail updates about the services), even though Petitioners do not even want to send in any forms at all, or do anything which could possibly facilitate contraceptive services.

This factor is one of the major ways that the instant cases differ from *Hobby Lobby*. There, *see id.*, there was a straightforward expansion of an accommodation re contraception. But here, how do

the services even get to women in the first place? What are their names? Etc.

So there may be more difficulties for the State, and for women, to provide or receive contraceptives, than in *Hobby Lobby*.

Petitioners' merits brief in 15-35 et al. makes light of this, saying,

> The government protests that "'requiring [employees] to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women.'" No. 15-35 Br. in Opp. 23 (quoting 78 Fed. Reg. at 39,888). But the government may not "assume a plausible, less restrictive alternative would be ineffective" just because it "requires a consumer to take action." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 815 (2000).

Id. at 72. However, there are some issues here.

First, the correct cite for the latter quotes should actually be to page 824, not 815, of *Playboy*, *supra*.

Also, in *Playboy*, the issue was blocking pornographic images from televisions, *see id. passim*; and channel-blocking devices, even if consumers had to go through the trouble of requesting them, were apparently free, *see id.* at 810. By contrast, contraceptives may not necessarily be free under all of the alternatives that Petitioners mention to the contraceptive mandate.

Moreover, "It should be noted, furthermore, that Playboy is willing to incur the costs of an effective [statute section enabling blocking]." *Id.* at 824 (Kennedy, J.). By contrast, Petitioners here have, of course, not shown much enthusiasm for paying higher wages to female employees, or paying for any of the Government's expenses in facilitating contraceptive services. When Playboy Entertainment Group is more willing to contribute money to the social good, *see id.*, than Petitioners are, one wonders what is going on.

Also, a fuller, more revealing quote than one that Petitioners offer is, "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Id.* But in the instant cases, Petitioners seemingly do not want to give women employees "full information", *id.*, of their choices, or to give "full information" to insurers of the identities or relevant health information of the employees. If the Government has to do this, give this full information, perhaps Petitioners could be fined in the amount of the Government's expenditures in doing so—which could be fairly small (though not necessarily just *de minimis*) in our computerized age.

See also, "There is no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed (if they are not yet aware of it) and about their rights to have the bleed blocked[.]" *Id.* at 823. The *Playboy* Court, *see id.*, is concerned about keeping consumers informed of their rights. A laudable ideal.

So *Playboy*, ironically enough by its name, may do more for women's rights in the instant cases than Petitioners might like it to. —But everyone's rights are important to Amicus, so we shall now consider some of the broader implications of the "cost-neutral" model Amicus has mentioned, whereby those with religious objections may be free from State limitation of their activities, but may also have to pay for any externalities/burdens they generate.

IX. THE KIM DAVIS CASE AS AN ILLUSTRATION OF HOW TO ALLOW RELIGIOUS FREEDOM WITHOUT INFRINGING ON OTHERS' RIGHTS

For example, there is the case of Kentucky county clerk Kim Davis, a Christian who has refused to offer marriage licenses to same-sex couples. Amicus believes that Davis may have a right of conscience not to participate in offering the licenses—at least as long as she places no burdens, externalities, beyond the *de minimis* onto other people.

Some may say that as a sworn official, Ms. Davis cannot refuse to perform official services. But even Members of this Court may recuse themselves from service at times. Why should not Davis be allowed to recuse herself as well?

On a similar note: does a doctor at a government facility have to perform abortions against her will, simply because she is at a public facility and is being paid with public money? That seems wrong.

That being said, Davis does not therefore have any right to prevent *other* clerks, or her entire office, from offering marriage licenses. (If, hypothetically,

she and every clerk at her office refused to give marriage licenses: if they personally paid for the gas, and any other travel-related expenses, of any same-sex couple who had to drive to another county to get the license, maybe an argument could be made for giving the clerks an exemption. But Amicus suspects Davis might not like the idea of having to pay for the gas; and maybe hundreds of couples would swamp her office, to force her to pay gas for all of them...)

If someone can abstain from service for religious reasons, and the customers get to be served without undue inconvenience, and the abstainer does not have to do less work than other workers, then those factors may legitimate the objector's abstention. Conversely, if the abstainer is evading work, and the customers are unduly inconvenienced by the official's abstinence, that may be a problem.

A relevant supporting hypothetical: a devout Orthodox Jew, Shmuel Goldblat, and an ardent orthodox Moslem, Mohamed Ali, are two meat inspectors who were on the beef detail, but are then for the first time assigned to inspect pork. They refuse to do so out of religious conviction, and their personal interpretations of their faith(s). But Ronnie Piggles, a pork manufacturer whose products are inspected at the facility where the men work, files a legal complaint that he is being demeaned, damaged, and expressively harmed by the devout duo's exempting themselves from pork-inspective activities.

What to do? Force Shmuel and Mohamed to defile themselves before the God of Abraham (or

"Ibrahim") by touching the forbidden flesh? Or force them to resign so that they and their families suffer?

What if, say, other co-workers can do the pork inspections instead, and Goldblat and Ali can take over some of those workers' duties, so that Goldblat and Ali do not serve fewer hours of labor than their co-workers? If this were so, the two would not have to inspect pork, but the pork would still be inspected, and the workload would still be evenly distributed—and Mr. Piggles may not have much to cry about.

If this were so, what is the problem with giving an exemption to Shmuel and Mohamed? Should the State be an engine of coercion and violate the two men's religious rights, when those religious devotees are not really dumping externalities onto anyone else?

Amicus says, "Maybe not." And similarly with other cases of religious abstention: if there is a cost-neutral way to allow a religious exemption, then liberty could be protected without burdening others.

X. "CHURCH OF THE POOR": WHY PETITIONERS CAN LIKELY AFFORD TO PAY FOR EXTERNALITIES MORE THAN TAXPAYERS CAN

Churches and their allied groups, after all, may be wealthy enough to pay for their externalities. American churches were certainly able to pay large damages after various child-molestation scandals of recent decades. And maybe they are divinely obliged to pay for what burdens they create; *cf.* Joshua J. McElwee, *Pope Francis: 'I would love a church that is poor'*, Nat'l Cath. Reporter, Mar. 16, 2013, http://

ncronline.org/blogs /francis-chronicles/pope-francis-i-would-love-church-poor,

> On his election to the papacy, Argentine Cardinal Jorge Mario Bergoglio chose to name himself after Francis of Assisi because the 12th-century saint "is the man of poverty[".]
>
> "How I would like a church that is poor and for the poor," he told about 5,000 journalists[.]

Id. Amicus admires groups like the Little Sisters of the Poor, but if their female employees do not receive wages equivalent to their denied contraceptive package, then those employees are arguably being made "little sisters who *are* poor", or are at least made poorer than they should be. "Charity begins at home", and religious groups should make sure their own workers are not underpaid.

Religious groups, like other corporations, may be far more wealthy than an average taxpayer: Amicus does not want his own taxpayer money paying for any externalities caused by Petitioners (at least beyond a *de minimis* level), when they could pay for them themselves, and act in humility like "a church that is poor", *id.* To have any corporations, religious or not, be effectively above the law, is not advisable, especially in an America which many people, and not just Bernie Sanders, see as suffering corporate domination at times, whether by Wall Street firms or any other corporations.

—Amicus' preference is that Petitioners *ideally* do not have to pay anything at all. That is, that the

externalities will be found by Court investigation to be so small, *de minimis*, as not to need any cash outlay by Petitioners to defray cost of those externalities. If, however, that cost is more than *de minimis*, then Amicus has given some ideas as to how costs might be apportioned and routed.

* * *

The seven instant cases have a volatile mixture of religious rights, women's rights, sexual activity, drugs, healthcare, pre-natal right to life, general welfare, individual rights, organizational or corporate law, money, etc., mixed with philosophical issues (what constitutes participation in evil? Signing a paper??). Amicus wishes the Court luck in threading the labyrinth. But workable solutions likely exist, even to the volatile question of *Cui paget?*, i.e., "Who pays whom and how much?"

Such solutions could rely on treating everybody as equals, rather than giving religious people a free pass, or giving their opponents a free pass either. If the former occurs, ignoring any externalities that Petitioners' actions or omissions cause, the public may wonder if five or six Roman Catholic Members of the Court, possibly all of them male, are giving a largely Catholic set of petitioners a free pass to disrespect women (and taxpayers), for reasons unsupported by logic, precedent, or justice.

Once more, we live in a time of religious strife, which may get worse. Recently, Chief Justice Roy Moore of Alabama has informed subordinates that same-sex marriage does not really exist in that great southern State of our Union, *see* AP, *Roy Moore denies defying U.S. Supreme Court in gay marriage*

order, AL.com, updated Jan. 7, 2016, 6:15 p.m., http://www.al.com/news/index.ssf/2016/01/roy_moore_denies_defying_supreme_court.html. Amicus is not endorsing same-sex marriage, but, law is law, and the Court may want to deal with this issue soon.

So the Court could help offer a sort of charter of freedom, equity, and peace not only in these cases, but in future religious-rights cases. Amicus can see dystopian futures possible in the Nation if either people like Petitioners are forced to violate their own consciences or be financially beaten about the ears; or conversely, if people like Petitioners are allowed to burden others without consequence. That dangerous dichotomy can be avoided, if the Court is willing to consider the dignity and freedom of Petitioners, and of their female employers, and of taxpayers. *See* once more *You Don't Own Me*, *supra* at 2, "I'm free and I love to be free/To live my life the way I want/To say and do whatever I please", *id.*

If everyone's dignity is considered, there can be equitable solutions that avoid false dichotomies and giving a lopsided victory to either side. *Cf.* Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral*, 84 Cornell L. Rev. 394 (1999) (advising mediation, practicality, and attention to context and enjoyment, instead of a more mechanical or bilaterally-adversarial approach to solutions). We are all Americans, brothers and sisters, after all.[8]

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[8] *Cf., e.g.*, Sister Sledge, *We Are Family* (Cotillion 1979), *available at* Pierre Richard, YouTube, Mar. 25, 2010, https://www.youtube.com/watch?v=eBpYgpF1bqQ.

CONCLUSION

Amicus respectfully asks the Court to reverse the judgments of the courts of appeals, and to add any needed improvements; and humbly thanks the Court for its time and consideration.

January 11, 2016 Respectfully submitted,

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